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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

No. ~~1375.~~ 190

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT AND NORTHERN DIVISION OF ALABAMA.

BRIEF OF COUNSEL FOR APPELLANT.

THOS. R. ROULHAC,
RICH'D W. WALKER,
FOR APPELANT.

Comstock & Baldwin, The Printers, Sheffield, Ala.,

IN THE

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SHEFFIELD FURNACE COMPANY, Appellant,

vs.

JAMES P. WITHEROW, - - - Appellee.

Appeal From the Circuit Court of the United States For the Northern District and Northern Division of Alabama, in Equity.

Brief of Counsel for the Appellant.

Statement of Facts.

The bill in this cause was filed by James P. Witherow; the appellee, a citizen of the State of Pennsylvania, against the appellant, a corporation chartered by

the State of Alabama, to enforce an alleged contractor's lien, conferred by the statutes of that State. He alleges that the property subject to the lien asserted was at Sheffield, Colbert County, Alabama, consisting of a coke blast furnace, constructed on a furnace site of twenty acres, and avers that he is entitled to a lien thereon, not only upon the furnace structure itself, but also upon either the whole twenty acres of said land, or upon the one acre upon which the furnace is located, but does not in the original bill define upon which of the two quantities of land the lien is sought, nor any facts from which the court can definitely ascertain it The law of Alabama provides for a statement of certain facts to be filed in the office of the probate judge of the county, in which the property is situated, which statement is a prerequisite of the acquisition and enforcement of any lien. The statement filed by complainant, a copy of which is made Exhibit "A" to his bill, describes the land as follows: "Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert County, Alabama, contiguous to the city of Sheffield, said twenty acres lying partly on one side and partly on the other side of a street two hundred feet wide to be laid off, etc." (P. R. 3.) After alleging other facts upon which his lien was supposed to rest, the prayer of the bill is that an account be had, and, if the amount ascertained be not paid, that the aforesaid lien be foreclosed. The amount claimed to be due, as shown by Exhibit A, is $63,279.43. A copy of the foregoing bill was applied for and obtained by the defendant thereto prior to October 1st, 1888. (P. R. 6.) On the 3d day of October, 1888, the defendant filed certain demurrers to this bill of complaint, which, however, were not supported by the certificate of counsel or the affidavit of the defendant, as prescribed in Rule 31 for the courts of equity of the United States. (P. R. 7.) Not regarding these demurrers, thus defective, on the 5th day of No-

vember, 1888, a decree PRO CONFESSO was entered against the defendant, on motion of the complainant's solicitor. (P. R. 8.) On the 14th day of November, 1888, the complainant's bill was amended; and in said amendment it was alleged that the city of Sheffield was incorporated as a city by the Legislature of Alabama, that in the Act doing so reference was made to a map prepared by a civil engineer, that a part of the ground so referred to in the original bill as the site of the furnace, was referred to and set forth in said map as constituted the city of Sheffield, and that the twenty acres, the furnace site, is subject to the jurisdiction and control of the authorities of the city of Sheffield, and that the furnace and appurtenant buildings are situated about the middle of said twenty acres tract, cover more than one acre of land, and without the whole of the twenty acres could not be operated so as to make the property remunerative. (P. R. 9.) No copy of this amendment was furnished to, or served upon the defendant as required by equity rule 28.

On December 19th, 1888, said cause was submitted to the judge of the Circuit Court for decree upon the following matters of evidence, viz: the verified statement and account of Witherow for a contractor's lien under the statutes of Alabama, and the contracts for the erection of the furnace and other structures referred to in the bill of complaint, and on the same day a final decree was rendered by which a personal decree was rendered against the defendant for the amount of the account claimed by the complainant with interest to the date of the deceee, and also a decree of foreclosure upon the property mentioned in the bill, including the twenty acres described in the exhibit to the bill as contiguous to the city of Sheffield, as was sought by the amended bill. (P. R. pp, 11-16.)

After the decree was rendered, and at some time not known to the clerk of the court, and without any leave of the court, Henry B. Tompkins, one of the solicitors for

the complainant, endorsed on the paper on which the amendment was written, the following: "The filing of this amended bill is erroneous and the same is withdrawn, no order of court having been obtained ordering thefiling thereof.

(Signed) HENRY B. TOMPKINS," (P. R. 10.)

It appears by the certificate of the clerk of the Circuit Court, the original of which appellant has had filed with the clerk of this court, that said endorsement was made without any authority whatever after the rendition of the final decree, and without either the consent or knowledge of the clerk. A copy of it is as follows:

"Circuit Court of the United States, Northern Division, Northern District of Alabama:

JAMES P. WITHEROW, Complainant,

vs.

THE SHEFFIELD FURNACE COMPANY, Defendant.

I, A. W McCullough, clerk of said court, do hereby certify that the endorsement on the amendment to the original bill of complaint in the above entitled cause, which endorsement is in the following words: "The filing of the amended bill is erroneous and the same is withdrawn, no order of court having been obtained ordering the filing thereof, signed Henry B. Tompkins, solicitor for complainant," was made thereon without my knowledge or consent and without the authority or permission of the court. I do not know when said endorsement was made except that it was not on said amendment when the final decree in the cause was rendered, and said amendment at the time of the rendition of said decree was on file with the other papers in the cause.

Witness my hand and the seal of said Circuit Court this sixth day of December, 1889. (Signed A. W. McCullough, Clerk Circuit Court. (SEAL.)"

A motion was made by the appellant on the 2nd day of February, 1889, to set aside the decree upon the grounds that said decree was void, because the court in equity was without jurisdiction to entertain a bill to enforce a contractor's lien created by the statutes of Alabama, for the reason that when the contract was made and the work was done, that statute provided a specific remedy at law for its enforcement; that by the statutes of Alabama the lien is imposed upon the lot of land on which the buildings are erected, and in the country or when not in a city, town or village, only to the extent of one acre, and that the lien asserted by the complainant in his verified statement filed in the office of the judge of probate for Colbert county, Alabama, and in his original bill was claimed upon land not in a city, town or village, while the lien was fixed by the decree on more than one acre, for which the law gave it; that said decree was rendered upon said bill, as amended, without any copy of said amendment being served upon, or furnished to, the defendent; and that no decree PRO CONFESSO was ever rendered on said amended bill, nor was said cause ever put at issue on said bill, as amended. (P. R. 17-23.)

The statute of Alabama in force when the contract was made, for which the lien is here claimed, is found in the Code of Alabama, (1876) Section 3440, which is in these words: "Every mechanic, or other person, who shall do or preform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for any building, erection or impovement upon land, or for repairing the same, under or by virture of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished, a lien to the extent and in the manner by this chapter provided, upon such building, erection or improvements, and upon the land belong-

ieg to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection, or improvement be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection, or improvement, and the lot or land upon which the same are situated, and upon any balance due by the owner or proprietor to the contractor, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler, or machinery furnished as aforesaid, as is herein provided."

The statute in force, when the work is alleged to have been completed, on June 27th, 1888, is found in the Code of Alabama, (1886) Section 3018, and is, as follows: "Every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, or contractor, or sub-contractor, upon complying with the provisions of this chapter, shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership, of all the right, title and interest therein by such owner or proprietor, and, in area, of the entire lot or parcel of land, if in a city, town, or village, or, if not in a city, town, or village, of one acre; but the lien of employes of the contractor and persons furnishing materials to him shall extend only to the amount of any unpaid balance due the contractor by the owner or proprietor; and such employes and material-men shall also have a lien on such unpaid balance."

The remedy given for the enforcement of the lien, by the Code of 1876, Section 3446, was as follows: "The pleadings, practice, process, and other proceedings, in cases arising under this chapter, and to enforce the same, shall be the same as in ordinary civil actions and proceedings in other cases, except as hereinafter otherwise

provided. The complaint, among other things, shall allege the facts necessary for securing a lien under this chapter, and a description of the property charged therewith."

SECTION 3452. FORM OF JUDGMENT ON PERSONAL SERVICE.—When the debtor has been served with summons according to law, or appears to the action without such service, the judgment, if for the plaintiff, shall be against such debtor, as in ordinary cases, with the addition that if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof be levied as provided in the preceding section—to be levied out of the property charged with a lien therefor.

SECTION 3453. EXECUTION, SPECIAL FI. FA., ADVERTISEMENT, SALE AND CONVEYANCE.—The execution to be issued under this chapter shall be a special fieri facias, and shall be in conformity with the judgment, and such writ shall be returnable as ordinary executions; and the advertisement, sale and conveyances under the same shall be made in all respects, as near as may be, as under ordinary executions."

The Code of 1886 went into operation, by the proclamation of the Governor, on December 25th, 1887. Knox vs. Childersburg, 86 Ala. 180, 184. It contained in substance, the same provisions as to the remedy for enforcing the lien. Code of 1886, Sections 3029, 3034, 3036.

It contained also these provisions:

"Section 3025. Selection of land, when tract exceeds one acre. When the land on which the building or improvement is situated is not in a city, town, or village, and exceeds in area one acre, the original contractor, or, if he dies, is absent from the state, or, for any cause, refuses or fails, on demand to do so, any other party entitled to the lien, may, at any time prior to filing his statement in the office of the judge of probate, select

the one acre which shall be subject to the lien; such selection to include the site of such building or improvement, and the lands contiguous thereto, and to constitute but one lot or parcel."

"Section 3048. When lien may be enforced in equity. Any lien provided for under the provisions of this chapter, when the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity, without alleging or proving any special ground of equitable jurisdiction."

The Code of 1886 also contains this enactment: Section 10. Laws continued in force and laws repealed. This code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases, the laws in force, at the adoption of this code shall continue in force."

Assignment of Errors.

The errors assigned by the appellant are:

I. That the court below erred in rendering the decree PRO CONFESSO against the appellant, after demurrers filed to the bill of complaint while the demurrers remained on file, unacted upon and undisposed of by the court.

II. That the court erred in allowing the amendment in a material point by the complainant without the

complainant's having furnished the defendant a copy with suitable references, as required by rule 28 of the rules of practice for the courts of equity.

III. That the court erred in rendering the final decree in the cause, without any decree PRO CONFESSO on the amended bill of complaint, and without said cause being at issue after said amendment.

IV. That the court erred in rendering the final decree in said cause.

V. That the court was without jurisdiction to entertain the cause, as made by the original and amended bills of complaint.

VI. That the court erred in refusing the motion of the appellant to set aside the final decree,

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Argument.

It is well, at the outset, to ascertain the character of the present suit. When this case was before the court at a previous term, on the motion of the appellee to dismiss or affirm, it was claimed that the decree might be maintained as one, enforcing an equitable mortgage, based upon the proposition of appellee, of May 27th, 1886, accepted by appellant, June 2nd, 1886. (P. R. 14–15).

It was stipulated in that proposition, that security should be given for payments carried over, "said security to be either a mechanic's lien or first mortgage on all the

furnace company's interests in Sheffield on the completion of said blast furnace, at my option."

This claim cannot be made under the bill as filed. In all its averments, it shows that its object is the enforcement of a contractor's lien under the Alabama statute. The allegations and the prayer are addressed to this single object. The enforcement of the contractor's lien is the matter of the bill. The decree to be passed must be confined to the matter of the bill. A decree PRO CONFESSO cannot properly be made, giving relief not appropriate to the averments and prayer of the bill. If such decree is made, it may be attacked on appeal, for the reason that it went beyond the matter brought before the court by the bill.

Ohio Central R. R. Co. vs. Trust Co. 133 U. S. 83;
Thomson vs. Wooster, 114, U.S. 104.

But the clause in the contract, upon which is based the right to claim the mortgage, gave to the appellee the option to claim such mortgage, or to take a mechanic's lien, as his security. Which of the two methods he should pursue was to be determined by his exercise of the option. He exercised the option, by filing the bill in this case, to enforce a mechanic's lien, and claiming nothing in the shape of a mortgage by virtue of contract. By prosecuting a claim for a lien under the statute, he waived the right to pursue the alternative security of a mortgage on the property.

Vane vs. Newcombe, 132, U. S. 220.

A contract stipulating for a first mortgage on all the furnace company's property in Sheffield, or a mechanic's lien, at Witherow's option, could not by itself operate as an equitable mortgage, the property not being described or ascertained, nor the exercise of the option appearing in the contract. The election would have to be made and the bill framed to enforce such a contract before there could be any mortgage, and, without

averments in the bill showing such election, it would have been error for the court to assume the mortgage as made, and to decree the foreclosure thereof.

II. Under the Alabama statutes hereinbefore set out, the contractor's lien upon the land upon which the improvements were made, is confined to one acre of land, unless the property upon which the lien is claimed is in a city, town, or village. If the property is not within a city, town, or village, the one acre of ground, to which the statutes confine the lien, must be particularly described in the statement of lien, required to be filed in the office of the judge of probate, and this must be shown by the pleadings. Code of Ala. 1886, Secs. 3018–3022.

Montgomery Iron Works vs. Dorman, 78 Ala. 218;
Bedsole vs. Peters, 79 Ala. 136.

It is only by showing that the property upon which the lien is claimed, is in a city, town or village, that the right to have a lien upon a lot of land, containing more than one acre, is disclosed. The lien in this case is claimed upon a tract of twenty acres. The original bill did not show that this tract was in a city, town, or village. To give the complainant the right to have the lien enforced upon the whole of this twenty acre tract, it was necessary to amend the bill, so as to show its location within a city, town, or village. It is only by the amendment, that the appellee showed to the court that the lot of land was in a city, town, or village. This amendment is the basis, if any can be found, upon which to sustain the right to declare and enforce a lien upon the twenty acres tract, the original bill having left undetermined the matter of whether the lien was claimed on the whole tract of twenty acres, as in a city, town, or village, or not, the bill alleging, that the complainant "is entitled to and has as such original contractor and builder a first lien * * * * upon either the whole twenty acres of said furnace site (as set forth in said Exhibit A.) or, in any

event, upon the one acre upon which said furnace is located." (P. R. 2).

It is only, then, by the amendment, showing that the twenty acres tract is in a city, town, or village, that the right to have a lien on the whole of it is shown. It follows from this that the amendment was in a material point, as introducing for the first time an averment essential to support the decree as rendered, to enforce a lien upon the whole twenty acres tract.

Rule 28 of Equity Rules requires that, if the complainant amends in a material point, after a copy of his bill has been taken, before any answer, or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. The record shows that a copy of the bill was taken by the defendant before the bill was amended. (P. R. 6). The final decree declares and directs the enforcement of of a lien upon the twenty acres tract. The decree to this effect is without pleading to support it, if the amendment, disclosing the location of the tract, in a city, town or village, is discarded.

That the decree, as rendered, was based upon the bill, as amended, is shown by the decree itself, for the reason that, if only the original bill had been looked to, the court would have confined the lien to one acre of ground particularly described. That the amendment was before the court, as a part of the whole record, is further shown by the affidavit of the clerk, filed on this appeal and set forth in the foregoing statement.

No copy of this amendment was furnished to the appellant, as required by Equity Rule 28. The requirement that such copy be furnished, is intended to provide process, in the nature of summons or notice, to the defendant of the new matter set up by the amendment, that he may defend the same. Without such notice,

there can be no decree PRO CONFESSO on the new matter set up by the amendment.

Without such notice to authorize a decree PRO CONFESSO, and without such decree PRO CONFESSO, to put the cause at issue, no final decree, embracing the new matter of the amendment could properly be made. Yet in this case, without any decree PRO CONFESSO on such amended bill, a final decree was rendered, on the 19th day of December 1888, subjecting the whole of said twenty acres to the satisfaction of said lien. This decree was void, in that the appellant had not been summoned, or served with process in any manner, to answer said amended bill, and defend against the new claimmade thereby. Decrees rendered without process, or contrary to the rules of practice established are void, and may be set aside, upon motion, at any time. By the rule above referred to, service of the notice of the amendment therein provided for becomes process of summons by the court to answer the amended bill. Without such service the court acquires no jurisdiction, as to the matter contained in the amended bill, over the person of the defendant and a decree agair st him is void.

Windsor vs McVeagh, 93. U. S. 277;
Settlemeir vs Sullivan, 97, U. S. 444;
Fellows vs Hall, 3. McLean, 282, 487;
Treadwell vs Cleveland, 3, McLean, 283;
Wiggins vs Gray, 24. How. 305;
Pickett vs Ledgerwood, 7. Pet. 144;
Harris vs Hardeman, 14. How. 334;
Hawes on Jurisdiction Sec. 229, n. 8.

It was necessary, before any final decree could be rendered, that the cause shou d be at issue. In this instance no decree PRO CONFESSO was rendered on the amended bill, and yet, without notice of fhe amendment or answer of the defendant, or decree PRO CONFESSO, a final decree was rendered for the complainant, as prayed for in the amended bill. By rule 90 of Equity Rules

the English chancery practice prevails in the absence of a rule established by this court. By the English Chancery practice, no final decree could be rendered until the cause was at issue by the answer of the defendant, or by decree PRO CONFESSO, if no answer was made.

1. Dan. Ch. Prac. 403, 523;
French vs Hay, 22. Wall. 245;
Bank of U. S. vs White, 8. Pet. 262;
Boyle vs Zacharie, 6. Pet. 648;
Hipp vs Babin, 14. How. 271.

Appellee amended his bill in a material point, (as he could do, of course,) after a copy had been taken by appellant. Such amendment became part of the bill. Leave of court was not required to file it. (Equity Rule 28.) Having thus become a part of the bill, it could not be stricken therefrom, except by order of the court, even if it is determined that the amendment to the bill was properly withdrawn, and disappeared from the record, yet this would not cure the error of the court, in rendering the final decree; for the reason that by that decree a lien is declared and directed to be enforced upon a tract of land, while the original bill neither described or pointed out one acre of land, upon which alone a lien was authorized by the statute, if the land was not in a city, town, or village; nor did it show that the tract of land was in a city, town or village. This defect of averment in the bill left the court without jurisdiction to declare a lien upon any land. The record shows that the amendment regularly became a part of the bill; the record does not show that that amendment ever ceased to be a part of the bill by any action taken before final decree. No final decree could be rendered on the bill as amended, without notice to the appellant, and an opportunity to make defense to the case as disclosed by the amended pleading. The final decree having been rendered, on the bill

as amended before it was at issue, that decree is erroneous.

III. The Circuit Court was without jurisdiction of a bill in equity to enforce a contractor's lien, under the Alabama statute. The lien and the remedies for its enforcement are creatures of statute. Prior to the adoption of the Code of Alabama of 1886 the only remedy provided by the statute for the enforcement of such lien was an action at law: Under the statute, as it then existed, a bill in equity could not be maintained in the Alabama courts.

Chandler vs. Hanna, 73 Ala., 392.

In the Alabama Code of 1886 the provision for the enforcement of the lien by action at law was preserved. By that Code, as hereinbefore shown, a new provision was added authorizing such lien, in certain cases, to be enforced by bill in equity, without alleging or proving any special ground of equitable jurisdiction. Code of Ala. 1886, Section 3048. The result then of the Alabama statutes, at the time the bill in this case was filed, is that the special remedy prescribed for the enforcement of a contractor's lien is an action at law, while a new jurisdiction is conferred upon the State court of Chancery, to enforce such liens, regardless of the existence of any special ground of equitable jurisdiction. The State court of chancery has acquired the power to enforce such lien, not because the special remedy prescribed by the statute is in its nature an equitable remedy, but because the statute expressly confers upon it a new jurisdiction in regard to such liens. This court has been scrupulous in adhering to the rule, that equity jurisdiction must be declined by the Federal courts, in every case where a plain, adequate and complete remedy may be had at law.

Scott vs. Neely, 140 U. S., 106;
Smith vs. N. O. Canal &c. Co., 141 U. S., 656.
Whitehead vs. Shattuck, 138 U. S., 146.

It has been recognized that where a statute creates a new equitable right, which is capable of assertion by proceedings in conformity with pleadings and practice in equity such right will be enforced in those courts, if such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States.

Scott vs. Neely, SUPRA.

Whitehead va. Shattuck, SUPRA.

It has also been recognized that where the particular remedy, prescribed by statute for the enforcement of a new right is essentially a suit in equity, such remedy may be enforced in the Federal Court by bill in equity.

Davis vs. Alford, 94 U. S. 546.

For the enforcement of the right to a lien, given by the statute of Alabama to contractors and others the statute prescribes a plain, adequate and complete remedy at law. When that right is sought to be enforced in a Federal court, it must be by action at law. The right of the State Chancery court to enforce the lien is not based upon the inadequacy of the legal remedy but upon the enlargement of its jurisdiction by statute. The right to maintain a bill in equity in the Federal Court, for the enforcement of such lien, must be rested upon the inadequacy of legal remedy. The jurisdiction of the Federal Court cannot be enlarged by a State statute, which merely enlarges remedies in its own courts of equity. The right sought to be enforced in this case is one created by a State statute. The special remedy prescribed by that statute, for the enforcement of the right, is an action at law. That remedy is full, adequate and complete, and can be pursued in the Federal Court. The right, then, to maintain a bill in equity in the Federal Court, for the enforcement of such right, cannot be based upon any inadequacy or incompleteness of legal remedies, but must depend upon the statute of a State conferring upon its courts a power to enforce a new

remedy, not included in a general equitable jurisdiction. We submit that the equitable jurisdiction of the Federal Court cannot thus be enlarged by State legislation. A bill in equity cannot be maintained in the Federal Court for the enforcement of a new right created by statute, unless the special remedy prescribed by the statute for the enforcement of such right is in its nature and characteristics an equitable proceeding; or unless, the statute not prescribing the remedy to be pursued for the enforcement of the right, the right itself is in its nature an equitable one, or requires for its due enforcement remedies which only a court of equity can afford. These conditions do not exist, when for the enforcement of the new right the statute prescribes a plain adequate and complete remedy by action at law

In Davis vs. Alvord, SUPRA, the one remedy prescribed for the enforcement of the lien was in its nature an equitable proceeding. In the present case, there was available to the appellee a plain, adaquate and complete remedy by action at law, and that proceeding possessing no equitable features. The remedy by bill in Chancery is cumulative, and its enforcement in the State court is not dependent upon any inadequacy in the legal remedy.

IV. The record shows that within the proper time the appellant filed a demurrer to the original bill. (P. R. 7.) The grounds of that demurrer raise substantial questions, going to the merits of the case, sought to be presented by the original bill. That the demurrer was interposed in good faith, and set up substantial objections, is manifest from its inspection. It is plain that the failure to comply with the requirements of Equity Rule 31 was owing to inadvertence of counsel, no such certificate or affidavit being required by the practice in the Alabama courts. It was by disregarding this demurrer, for want of regularity that the complainant was enabled to proceed EX PARTE to a final decree. The

record makes it plain that, if there are errors justifying a reversal, a remandment of the cause would be in the interest of substantial justice, and enable the appellant to make, what it insists is a meritorious defense. (P. R. 22.)

THOMAS R. ROULHAC, and
RICHARD W. WALKER,
For Appellant.

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No. 190. October Term, 1892.

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James P. Witherow, Appellee.

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BRIEF OF APPELLEE.

A. H. WINTERSTEEN,
HENRY B. TOMPKINS,
WAYNE MacVEAGH,
For Appellee.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

Sheffield Furnace Company, Appellant,

vs.

James P. Witherow, Appellee.

October Term, 1892.

No. 190.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

On the fifth day of September, 1888, James P. Witherow filed his bill against the Sheffield Furnace Company, in which he sought to foreclose liens against a certain furnace and appurtenances, and the twenty acres of ground upon which they were situated, at Sheffield, Colbert County, Alabama.

The bill sought an enforcement in two aspects:—

First.—To foreclose an equitable mortgage existing under the contract made to construct a certain iron furnace, by the

Sheffield Furnace Company with Witherow, which was entered into in writing on the second day of June, 1886, a copy of which contract was submitted in proof at the hearing of this cause in the court below; and which is to be found in the record on pages 14 and 15.

Second.—It was also sought by the bill to foreclose a mechanic's lien upon the same premises; a copy of the lien proceedings as taken under the statute and laws of Alabama being annexed to the bill as "Exhibit A," and are found in the record, pages 3, 4, and 5.

A subpœna was duly served upon Alfred H. Moses, president of the said Sheffield Furnace Company, on the sixth day of September, 1888, and returned into the clerk's office on the seventh day of September, 1888. See record, pages 5 and 6.

No appearance was entered by solicitor or counsel for the Sheffield Furnace Company at any time; but on the third day of October, 1888, a paper was filed in the clerk's office, purporting to be demurrers of defendant, but such paper did not have any affidavit of defendant, or certificate of counsel as required by equity rule No. 31. See record, pages 7 and 8.

At the November rules, being the fifth day and the first Monday in November, 1888, complainant, through his counsel, took a decree *pro confesso* against the Sheffield Furnace Company, there having been no appearance of counsel nor any legal demurrer entered in the cause by defendant. See record, page 8, fol. 18.

On the fourteenth day of November, 1888, a paper, purporting to be an amendment to the said bill of complaint, was filed in the clerk's office, but was afterwards withdrawn as being erroneous, no order of court having been obtained authorizing the filing thereof. See record, pages 9 and 10.

At the October term, 1888, of said court, which began on the second Monday in October, and was in regular session during the month of December, complainant, through his counsel, applied to the court and obtained a final decree in the said cause; as is shown in the printed transcript of record, pages 10 and 11.

This final decree was entered on the nineteenth day of December, 1888, and, besides the pleadings in the cause, certain proofs were submitted to the court, as follows:—

1. The original papers, which were filed in the office of the Judge of the Probate Court of Colbert County, by which a mechanic's or contractor's lien was established upon the furnace, appurtenances, and site of twenty acres at Sheffield, and which papers were filed in said probate office on the 27th of June, 1888, and duly recorded; all of which is shown by reference to record, pages 11, 12, and 13.

(On this the bill was framed to enforce a mechanic's lien.)

2. A duplicate original of a written proposition and acceptance, forming the contract under which said furnace was constructed, and by which said Witherow was given an equitable mortgage upon "all the furnace company's interests in Sheffield." See record, pages 14 and 15.

(On this the bill was framed to enforce an equitable mortgage.)

3. A written proposition and acceptance made between said Witherow and said furnace company on the eighth day of November, 1886, by which said Witherow constructed a stock-house for said furnace, which was not included in the original written agreement to build the furnace. See record, page 15.

4. A letter from Ogden Street, superintendent of said defendant furnace company, written on the 21st of May, 1888, whereby he certified that said Witherow, on 24th April, 1888, had complied with his contract to construct said furnace. See record, page 16.

5. These proofs were submitted to the court, accompanied by the affidavit of Henry B. Tompkins, which affidavit was made on the seventeenth day of December, 1888, and filed in court on the nineteenth day of December, 1888, and which has been left out of the record transcripted to this court, but

a certified copy or the original has been filed in the clerk's office of this court, and which affidavit is as follows:—

IN THE CIRCUIT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT AND DIVISION OF ALABAMA.

James P. Witherow vs. *The Sheffield Furnace Company.*	In Equity. Foreclosure of Contractor's Lien.

Before me, the undersigned, personally came Henry B. Tomkins, solicitor for the complainant, James P. Witherow, who is a non-resident, and on oath deposes and says:—

1. That as solicitor and agent for said complainant the matters of fact set forth and alleged in the bill of complaint and the amendment thereto are true.

2. That the duplicate original of the contract between the Sheffield Furnace Company and the said James P. Witherow, as original contractor and furnace builder, was accepted and entered into on 2d June, 1886, by Horace Ware, then president of said company, Henry B. Tompkins and Alfred H. Moses, these three forming the executive committee of said company; and that said Ware and Moses signed such acceptance on the 2d June, 1886, together with and in the presence of affiant, and also in the presence of James P. Witherow, who had then and there signed the proposition. And that the paper marked "No. 1," and filed as proof in the above stated cause, is the original paper forming said contract between the parties.

3. That the contract between the parties, by which a stockhouse for the furnace of defendant was made by a letter written by said complainant on the 8th October, 1886, addressed to defendant, and the proposition in which letter was duly accepted for said defendant by its then president and ex-

ecutive officer, Horace Ware, is shown by the original letter forming the contract, and which said contract letter is marked "No. 2," and filed as proof in the above-stated cause.

4. That affiant was a director and member of the executive committee of the said defendant, the Sheffield Furnace Company, from before the 2d June, 1886, until about April, 1888; and that he knows that Ogden Street was the regularly appointed and paid superintendent of said company; and that the signature of "Ogden Street, superintendent," to the letter of 21st May, 1888, is genuine; and that said letter is marked "No. 3," and filed as proof in the above-stated cause.

HENRY B. TOMPKINS.

Subscribed and sworn to before me, this 17th December, 1888.

A. W. McCULLOUGH,
Clerk United States Circuit Court Northern District of Alabama.

Endorsed: Filed in clerk's office this nineteenth day of December, 1888.

A. W. McCULLOUGH,
Clerk.

The above constitutes a statement of all the pleadings, proceedings, and proofs in the original equity cause filed by Witherow against the Sheffield Furnace Company. But on the second day of February, 1889, nearly two months after the adjournment of said court, counsel for the Sheffield Furnace Company applied to the Honorable John Bruce, United States District Judge, for leave to file what they called a petition and motion to set aside said final decree in said equity cause rendered on the 19th of December, 1888. This motion and petition of said furnace company embraces a long and involved statement, to which was appended as an exhibit all the proceedings and pleadings of the said original equity cause, beside other matters. These proceedings are to be found in printed record, pages 16 to 41 inclusive, and contain more than half of the whole transcript.

This motion and petition of the Sheffield Furnace Company came on to be heard and was duly argued by counsel before Judge Bruce in chambers at Montgomery, Ala., on the fourteenth day of February, 1889, and on February 15th, 1889, the judge entered an order refusing to set aside said final decree, which order is set forth in the record, page 41.

This transcript of the record, as sent up and certified by the clerk of the Circuit Court for the Northern District and Northern Division of Alabama, contains not only all the papers and proceedings in the original equity cause (except the affidavit of Henry B. Tompkins above referred to), but also contains all the papers connected with the said motion and petition of the Sheffield Furnace Company to set aside said final decree granted in the original equity cause of Witherow *vs.* Sheffield Furnace Company.

In the petition filed by the Sheffield Furnace Company to the court below, to have set aside the decree in favor of Witherow, the appellant states that the land upon which Witherow filed his claim of lien is not the same as that upon which the furnace was really situated. And appellants set forth the description of the land upon which the furnace is situated, as follows :—

"Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert County, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street or avenue two hundred feet wide, laid off by the Sheffield Iron and Coal Company of Alabama, and now known as Railroad Avenue, and being bounded on the northwest by the Tennessee River and by said Railroad Avenue (which has been laid off as an avenue over which tracks may be laid by said railroad companies and furnace companies, and make a route to and from the eastern quarter of a mile of the Sheffield Landing to and from said roads now in or being built into Sheffield or that may be hereafter be built into Sheffield), bounded on the southwest by said Railroad Avenue and by a line drawn through the centre of a ravine along and across which said Railroad Avenues crosses near the river, and also near the southern corner

of said twenty acres of land; bounded on the southeast by Twenty-second Avenue, and on the northeast by a line that with the other boundary lines, excluding said Railroad Avenue and other avenues or streets, will embrace twenty acres of land, on which said Sheffield Furnace Company has nearly completed the erection of a large iron blast furnace and appurtenances."

See printed transcript of record, page 22.

Looking to the description of the land upon which Witherow did file his lien in the office of the judge of probate of Colbert County, Alabama, on the 27th of June, 1888, and upon which he alleges he had erected the furnace, the description is found to be as follows:—

"Twenty acres of land in fractional section 29, township 3 range 11 west, in Colbert County, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street two hundred feet wide, to be laid off * * * and bounded on the northwest by the Tennessee River and the Sheffield Landing, on the northeast by Georgia Avenue, on the south by a line running from northeast to southwest parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill."

See printed transcript of record, page 3.

Now, it is a singular fact that, with the exception of some changes in the latter part of each of these descriptions one from the other, the real and controlling description is almost identically the same.

ARGUMENT.

This appeal is an attempt of the appellant to reverse upon purely technical grounds a decree regularly entered against it in the court below after it had an opportunity to defend on the merits and neglected to do so. A decree, *pro confesso*,

having been duly made November 5th, and a final decree, after full hearing, December 19th, 1888, the defendant, after the final adjournment of the term of the court, and after proceedings in execution had commenced, on February 2d, 1889, for the first time took any serious notice of the transactions in the cause, and petitioned the court to vacate the decree. The paper called a demurrer, printed in the record, page 7, must, of course, be ignored for its want of conformity with the equity rule as to affidavit and certificate of counsel. The court, upon the hearing of the motion to vacate after the term, was not only justified in the exercise of its discretion in refusing the motion, but was, in fact, absolutely bound so to act, for it is well settled that after the term at which it was rendered or entered, a judgment or a decree of a court is no longer subject to its control.

See Cameron *vs.* McRoberts, 3 Wheaton, 591;
Phillips *vs.* Negley, 117 U. S., 665;
Bronson *vs.* Schulten, 104 U. S., 410, 415.

The record for the consideration of this court is, therefore, that made by the proceedings up to the decree of December 19th, 1888, and found between pages 1 and 16 of the printed transcript, and the order refusing to set aside the decree and the appeal paper, on pages 41 to 45 printed transcript; the portions of the transcript between pages 16 to 41 (folios 37–87 inclusive) should be ignored.

On pages 44 and 45 of printed transcript of record are the assignments of error by solicitors for the appellant, which assignments are six in number.

1. The first assignment is, "That the court erred in rendering the decree *pro confesso* against the defendant after demurrers filed to the bill of complaint in said cause, and while the said demurrers remained on file in said cause unacted upon and undisposed of by the court."

That there was no error committed, as set forth in this assignment, the court is referred to the following authorities:—

Rule 18 of Equity Practice.

It was legal that the paper filed as a demurrer should be disregarded by complainant and the court.

National Bank *vs.* Insurance Co., 104 U. S., 55, 76.

That there was no legal demurrer of file.

See Equity Rule 31.

And as there had been no appearance of counsel and no demurrer such as the law recognized, the decree *pro confesso* might have been taken at the October rules instead of the November rules, 1888.

2. The second assignment of error is, "That the court erred in allowing the amendment in a material point by the complainant to his bill of complaint after a copy thereof had been taken out of the clerk's office by the defendant, without the complainant having furnished without delay to the defendant a fair copy of said amendment, free of expense, with suitable references to the places where said amendment was to be inserted, as required by rule 28 of the rules of practice for the courts of equity of the United States, established by the Supreme Court of the United States."

It appears from the printed transcript of record, page 10, that no order of court authorizing any amendment was ever made, and that the paper filed as one was withdrawn.

It appearing on page 6 of printed transcript of record that a copy of the bill had been applied for and taken out of the clerk's office before the 1st October, 1888, the complainant was not at liberty to amend the bill without payment of defendant's costs and furnishing a copy to defendant free of expense. As this was not done the bill could not have been taken to be amended, and especially in view of the fact that it was afterwards withdrawn by complainant's counsel.

Nor could the paper filed as an amendment operate as such, as defendant had not appeared, and process was not prayed or issued upon said amendment.

Longworth *vs.* Taylor, 1 McLean, 514.

There is nothing in the final decree showing that there was anything in that decree predicated upon the paper filed as an amendment and afterwards withdrawn.

See final decree, printed transcript of record, pages 10 and 11.

But conceding for the sake of the argument only that defendant had appeared in court by filing a paper purporting to be a demurrer at October rules, 1888, and that, being so in court, then the defendant was not entitled to receive from the complainant a copy of the amendment.

The most that can be contended on the part of the appellant is that the failure to furnish a copy of the amendment prevented the paper from becoming an amendment; and this is what the appellee also contends, because no order of court was taken and the paper was withdrawn before the decree.

3. The third assignment of error is, "That the court erred in rendering the final decree in said cause, dated the nineteenth day of December, 1888, without any decree *pro confesso* having been rendered on the bill of complaint as amended, or after said amendment to said bill had been filed in said cause, and without any cause having been at issue after said bill of complaint was amended."

It is shown that there was a decree *pro confesso* because there had not been either an appearance entered or legal demurrer filed by the defendant. And such being the case the complainant was authorized to take a decree *pro confesso*.

Rules 18 and 31 of Equity Practice.

The decree *pro confesso* having been taken at November rule, 1888, on fifth day of that month, the complainant was fully authorized to apply for and obtain a final decree on the 19th December, 1888, which was more than thirty days after the decree *pro confesso*.

Rule 19 Equity Practice.

Thomson *vs.* Wooster, 114 U. S., 104.

4. The fourth assignment of error is, "That the court erred in rendering the final decree in said cause, dated the nineteenth day of December, 1888."

This assignment of error is disposed of by authorities above cited to show that there was nothing in the third assignment of error.

5. The fifth assignment of error is, "That the court was without jurisdiction to entertain said cause as made by said bill of complaint as originally filed or as amended."

It is well settled, as shown elsewhere in this brief, that a court of equity, especially Federal courts of equity, have jurisdiction to enforce liens, of whatever description, against real estate. And, indeed, liens against real estate can be enforced in Federal courts only on the equity side thereof.

6. The sixth assignment of error is: "That the court erred in refusing the motion of the defendant to set aside the said final decree in said cause."

There certainly was no error in the order of court refusing the motion of appellant to set aside said final decree, which order so refusing to set aside said decree is in printed transcript of record, page 41. The only ground the court deemed necessary to mention for the refusal to set aside this decree was that the motion was not made until after the final adjournment of the term of court at which said final decree was rendered. And this question is fully discussed elsewhere in this brief.

Bronson *vs.* Schulten, 104 U. S., 410, 415;
McMicken *vs.* Perin, 18 Howard, 507.

A consideration of the petition of appellant to have the decree set aside shows that no charges of fraud or improper conduct of appellee, or his counsel, is alleged.

Printed record, pages 17 to 23.

The argument for the appellee will consider the record for the purpose of establishing two propositions:—

I. There is on the face of the record no ground for reversal for any technical error or irregularity in the proceedings.

II. There is no ground for reversal on the merits.

I.

There is on the face of the record no ground for reversal for any technical error or irregularity in the proceedings.

The salient facts of record must be kept in mind.

(*a.*) There was no appearance entered by the appellant.

(*b.*) The only paper filed by the appellant was what purported to be a demurrer, and which had neither the affidavit of the defendant or certificate of counsel annexed thereto, as provided by equity rule 31, and the paper was therefore properly disregarded by the court. (Record, pages 7 and 8.)

(*c.*) A decree *pro confesso* was regularly taken by the appellee against the appellant. (Record, page 8.)

(*d.*) The paper in the record purporting to be an amendment to the bill had been withdrawn by counsel, as shown by the indorsement thereupon. (Record, page 10.)

(*e.*) The decree recites all the facts necessary and proper to authorize the court to enter up such final decree. (Record, pages 10 and 11.)

(*f.*) Precaution was taken to introduce proofs to authorize the decree upon the merits; so that it was more than a decree by default for failure to appear and plead in the cause. (Record, pages 11–16.)

The general principle applicable to the case in its present *status* is that only such defense can be set up as could have been taken advantage of by general demurrer; that is, if the bill did not state facts sufficient to constitute a cause of action.

McAllister *vs.* Kuhn, 96 U. S., 87.

But a general demurrer would not lie in the present case. "If any part of a bill in chancery is good, and entitles the plaintiff to relief or discovery, a demurrer to the whole bill cannot be sustained."

Livingstone *vs.* Story, 9 Pet., 632-638.

As to the contents of the defendant's demurrer and the plaintiff's amendment to the bill. These are not evidence,

for it is well settled that this court will not consider any paper not used by the court below at the hearing.

Boone *vs.* Chiles, 10 Pet., 177;
Lessee of Reed *vs.* Marsh, 13 Pet., 153;
Pacific Railroad of Missouri *vs.* Ketchum, 95 U. S., 1.

The appellant could not have objected to the bill as filed with a double aspect, as the prayers of the bill were in no respect inconsistent with each other.

Shields *vs.* Barrow, 17 How., 130, 144.

Nor was the bill multifarious; but, even if it were, the objection could not be taken in this court. "The objection of multifariousness cannot, as a matter of right, be taken by the parties except by demurrer or plea or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte* wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection that if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error when it has been acquiesced in by the parties up to that time. *A fortiori*, an appellate court would scarcely entertain the objection if it was not forced upon it by moral necessity."

Oliver *vs.* Piatt, 3 How, 333, 412;
Briges *vs.* Sperry, 95 U. S., 401.

Said this court, in Griffing *vs.* Gibb, 2 Black, 519, 522, 523: "The only point, in our view of the case, when it was on its hearing in the court below (on general demurrer) was whether the complainant had not shown, by the facts stated on the face of his bill, artificial as it may be in point of form, a case for relief within the jurisdiction of a court of equity."

It is necessary, therefore, to test the case by this simple

rule, which involves an examination of the bill in support of the proposition, that:—

II.

There is no ground for reversal on the merits.

The bill as filed in the court below demanded for the plaintiff the lien of an equitable mortgage or a contractor's lien upon the defendant's furnace property at Sheffield, and also a personal judgment against the defendant. The claim arose on a written contract between the parties, executed June 2d, 1886 (record, pages 14 and 15), which provided for the erection by the plaintiff of a furnace for the defendant upon a certain site of twenty acres, payments to be secured by either a mechanic's lien or first mortgage on all the furnace company's interests in Sheffield on the completion of said blast furnace, at the plaintiff's option. The bill setting forth the facts claimed the rights secured for the plaintiff in the contract, and demanded a decree in his favor for the amount found to be due, and a foreclosure of the lien provided for in the contract. A personal decree was also demanded, and a prayer for general relief under the facts was appended. It is obvious that the decree of the court below may be sustained upon either of three grounds:—

1. As a foreclosure of the equitable mortgage created by the contract;

2. As an enforcement of the contractor's lien under the Alabama statute;

3. As a personal decree against the defendant.

1. The decree is to be supported as a foreclosure of the equitable mortgage created by the contract.

"An agreement on a sufficient consideration to give a mortgage on specific property creates an equitable lien upon such property. * * * If the written agreement shows a clear intention to make some particular property a security for a debt or an obligation equity will treat the instrument as an executory agreement to give security. The agree-

ment creates a specific lien upon the property, which takes precedence of the claims of subsequent creditors and purchasers with notice."

1 Jones on Mortgages, sections 161–163;
1 Jones on Liens, section 77;
Jones on Corporate Bonds and Mortgages, section 34;
1 Beach on Mod. Eq. Jur., sections 290, 291;
Ketchum *vs.* St. Louis, 101 U. S., 307, 316, 317;
Hauselt *vs.* Harrison, 105 U. S., 401;
3 Pom. Eq. Jur., section 1235.

A court of equity treats an agreement for a mortgage or pledge of bonds or other property as binding, and will give it effect according to the intention of the contracting parties.

White Water Valley Canal Co. *vs.* Vallette, 21 How., 414, 422.

The only conditions for the establishing of such an equitable mortgage are that the agreement must deal with some particular property, either by identifying it or by so describing it that it can be identified. It is not necessary that the property be described by metes and bounds. A designation by reference to the place where it is located is sufficient. (See Pinch *vs.* Anthony, 8 Allen, 536.) Thus, a covenant that all the land which the covenantor shall have on a certain day shall be charged or be security will create a lien, since the description enables the particular land to be identified.

Countess of Mornington *vs.* Keane, 2 DeG. & J., 292, 313.

The contract between the plaintiff and the defendant here stipulated that the defendant should at his option have a first mortgage or a mechanic's lien on *all the furnace company's interests in Sheffield.* (Printed record, page 14, folio 32.) Under the decisions this is a sufficiently definite designation of the property to establish an equitable mortgage. In Pinch *vs.* Anthony the description of the property in the contract for mortgage was "certain mineral lands situated in Southampton, East Hampton, and West Hampton, in Hampshire County, in

the State of Massachusetts, which said property is now standing in the name of Edward Anthony." In the present case the contract stipulates for a mortgage on *all the furnace company's interests* at the place, so that there can be no possible doubt about which property is subject to the mortgage.

The bill, both in its recitals of the fact and in its prayers for relief, clearly warranted the decree of foreclosure of this equitable mortgage. Indeed, the prayer for general relief would itself support such decree. And it is obvious from the decree of December 19th, 1888, that the court meant to enforce and did enforce the equitable mortgage provided for by this contract. The decree establishes the debt, directs payment thereof, declares the lien, and directs sale of the premises "in conformity with the rules and regulations governing the sale of premises upon which a mortgage debt has been duly foreclosed by process and decree" (record, page 11), and the proceedings throughout are strictly in accordance with the practice in foreclosure of mortgages.

2. The decree is also to be supported as an enforcement of a contractor's lien under the Alabama law.

The amount due, as shown by the bill, is $63,279.45, with interest. An account was prayed, a lien asked for, and a decree of sale of the premises demanded. The decree established all the material allegations of the bill, and was granted as prayed. The contractor's lien and the enforcement of the same were asserted under sections 3440 *et seq.* of the Code of Alabama of 1876, and under sections 3018 *et seq.* of the Code of Alabama of 1886, the relevant portions of which statutes are annexed hereto in an appendix.

The enforcement of a mechanic's lien is a matter for equitable jurisdiction in United States Courts.

Davis *vs.* Alford, 94 U. S., 545, and section 3048 of the Alabama Code of 1886 expressly recognizes such equity jurisdiction.

Idaho, &c., Land Co. *vs* Bradbury, 132 U.S., 509, 515;
De La Vergne, &c., Co. *vs.* Montgomery Co., 46 Fed. Rep., 829.

The filing of the claim in the office of the Judge of Probate operated as a creation of the lien.

Bell *vs.* Teague, 85 Ala., 211;
Watt *vs.* Vezin, 15 Phila., 180;
Myer *vs.* Berlandi, 40 N. W. (Minn.), 513.

And the lien having attached, it is well settled that a liberal construction must be put upon the statute for the purpose of fulfilling its objects, for the statute is highly remedial in its nature, and should receive a practical and reasonable construction to effect its objects.

2 Jones on Liens, section 1556;
De Witt *vs.* Smith, 63 Mo., 263.

If a compliance with matters in substance is shown, a strict and literal compliance is not exacted.

Chandler *vs.* Hanna, 73 Ala., 390-393;
Ex parte Schmidt, 62 Ala., 252.

The decree of the court below follows sections 3034-5 of the Code of Alabama of 1886, by ascertaining, first, that plaintiff had a lien as claimed, and then by giving judgment for the amount of said lien debt with interest and costs against the party liable for the same, and then by establishing the lien and by condemning specific property to sale for the satisfaction thereof.

Phillips on Mechanic's Liens, 311, 446;
Canal Co. *vs.* Gordon, 6 Wallace, 561.

Section 3035 of the Code of Alabama of 1886 expressly provides for the rendering of judgments by default in lien proceedings.

But if for any reason the lien should be impaired as to the land, it is established under the Alabama law that it is enforceable against the furnace itself, and an appellate court may modify the decree accordingly.

Bedsole *vs.* Peters, 79 Ala., 133, 136;
Code of Ala. of 1876, section 3444.

Said the Supreme Court of Alabama in the above case, which was in some respects similiar to the present: "The complaint was sufficient, in our opinion, to secure a lien upon the erection and improvements described, but not upon the acre of land upon which they were situated. The statute confers a lien in favor of mechanics, employés, and materialmen, both upon the building, erection, or improvements, and upon the land belonging to the owner or proprietor on which they are situated to the extent of one acre. Code, section 3440. It is required that any person seeking to enforce a lien of this kind should file a verified statement in the office of the probate judge, setting forth not only a just and true account of his money demand, after all just credits have been given, but also a true description of the property, or so near as to identify the same, upon which the lien is intended to apply. Code, sections 3444-45. The complaint must contain a like description of the property. Code, section 3446. In the case of Montgomery Iron Works *vs.* Dorman, 78 Ala., 218, we construed these sections of the Code to require that the particular acre of land on which the lien is claimed must be described with reasonable and convenient certainty that it should, in other words, be pointed out and designated by a description sufficiently certain to identify and separate it from the balance of the tract with which it may be connected." The court held that the description was not sufficiently definite in that case to establish the lien on *the land* under the statute, and then proceeded: "But it can be sustained, nevertheless, upon the building, erection, or improvements, they being described with reasonable certainty, as they clearly are in the present case. The declaration is clearly made in the statute that the lien shall be good on these structures, and upon the land on which they are situated, to the extent of one acre. Code, sections 3440-44. "*It is a several and not a joint lien, and both the letter and spirit of the law contemplate that the improvements erected may, in proper cases, be subjected to sale and removal from the premises by the purchaser.* * * * The policy of the law is to prevent the land-owner from unjustly appropriating to his own use the labor and material of the mechanic,

employé, or materialman by reason of the merger of these values into the freehold estate. The defendant cannot complain that the plaintiff enforced his lien on what the plaintiff has placed upon his premises and not also on the premises in addition to the improvement. Turner *vs.* Robbins, 78 Ala., 592. In Kansas City Hotel Co. *vs.* Sauer, 65 Mo., 279, the same view was taken of the Missouri law, of which our own is a substantial copy."

The exhibit annexed to the bill and the contract between the parties (record, pages 3, 14), all of which were before the court, set forth fully the property placed upon the land against which the lien was claimed. Under the decisions, therefore, whatever disposition may be made of the claim to a lien on the land, the lien on the structures erected thereupon must be sustained.

And this applies to the additional work of constructing the stock-house and putting in the boiler, both of which come under the original agreement.

"Where work or material is done or furnished, all going to the same general purpose, as the building of a house or any of its parts, though such work be done or ordered at different times, yet if the several parts form an entire whole, or so connected together as to show that the parties had it in contemplation that the whole should form but one and not distinct matters of settlement, the whole account must be considered as a unit, or as being but a single contract.

Page *vs.* Bettes, 17 Mo. App., 366.

It appears that the law in existence at the time of making the contract for the erection of the furnace and its appurtenances did not impose upon the contractor the duty of selecting one acre before filing and enforcing his claim or lien upon the furnace and erections solely.

See Code of Alabama of 1876, sections 3440, 3441, 3442, and 3444. (These four sections are printed in full in the appendix to this brief.)

And the law in force at the time of making a contract governs as to the rights of parties, while the law in force at the

time of the enforcement of a lien governs as to the method of enforcement.

Phillips on Liens, sections 24 and 25;
Turney *vs.* Sanders, 5 Ill., 527;
McRae *vs.* Craig, 23 Cal., 522.

This law in sections 3440 to 3444 of Code of 1876 was in force on 2d June, 1886, when the contract to erect the furnace was made. And this law gave a lien upon the erections separately from any land; and also provided that if the lien was taken on land that the claim should contain "a true description of the property, or so near as to identify the same."

"The repeal of a law cannot operate on rights already acquired, but only on the mode of enforcing them."

Phillips *vs.* M. O. Mayson, 7 Heisk. (Tenn.), 61;
Phillips on Liens, sections 24 and 25.

The law in existence at the time of making this contract between the Sheffield Furnace Company and James P. Witherow, under the ruling of the Dartmouth College Case, entered into and formed a part of the contract. And the obligation of this contract could not be impaired by depriving the appellee of the right to subject to his lien the furnace, stockhouse, appurtenances, &c., under the provisions of Code of 1876, section 3444, even if the Code of 1886 omitted the provision for enforcement against erections alone.

The contract was made for the building of the furnace on the 2d of June, 1886. (See transcript of record, pages 14 and 15.) The Code of Alabama known as "Code of 1886," wherein the law was changed, did not go into effect until after the twenty-eighth day of February, 1887. See Code of Alabama known as "Code of 1886," title page, as follows: "The Code of Alabama, adopted by Act of the General Assembly, approved February 28th, 1887; with such statutes passed at the session of 1886-87 as are required to be incorporated therein by Act approved February 21st, 1887," &c.

See, also, Acts of the legislature of Alabama of 1886-1887, page 47, wherein is found an Act to adopt a Code of laws for

the State of Alabama, approved February 28th, 1887, and which is printed in full in the appendix hereto. These Acts are also found in said Code of 1886, page 1.

Anomalous as it may appear the sections of the Codes, both of 1876 and 1886, provide for enforcement of liens upon the whole lot or parcel of land upon which improvements are erected, if it is in a town or city, but only on one acre, to be selected, if in the country.

Code 1876, section 3440;
Code 1886, section 3018.

The amendment to the bill which was withdrawn (see printed record, pages 9 and 10) was filed to show: (1.) That twenty acres of land on which furnace and appurtenances was built was "subject to the jurisdiction and control of the authorities of the city of Sheffield." (2.) That the furnace and appurtenances occupied more than one acre of land, &c.

3. The decree is finally to be supported as a personal decree against the defendant.

"When a plaintiff states facts which show both a money demand due in debt or *assumpsit* and a lien, and the proof shows the correctness of the amount claimed, but fails to sustain the lien under the statute, no reason is perceived why a personal judgment may not be rendered, even though the lien is not established by the judgment."

Bedsole *vs.* Peters, *supra*, citing Montgomery Iron Works *vs.* Dorman, 78 Ala., 218;
Williams *vs.* Porch, 51 Mo., 441;
Patrick *vs.* Abeles, 27 Mo., 184;
Phillips on Mechanics' Liens, section 448.

The bill filed having claimed both a lien and a personal decree, the latter is to be sustained as a decree against the property, even if the lien as a technical contractor's lien should fall. The appellee has therefore the *status* of a holder of a lien enforceable against the furnace and other erections made on the land, inasmuch as in Alabama, under sections 3034

and 3036 of the Code of 1886, a judgment on a foreclosure of a mechanic's lien has all the force and effect of a common law judgment. It is specifically provided by section 3034 that if the finding or verdict is for the plaintiff only on the issue of indebtedness, a judgment shall be rendered in his favor for the amount thereof, as in other cases. The decree in the present case, in any aspect, must, therefore, be held to bind the land.

See Blaufelt *vs.* Woodsworth, 31 N. Y., 285;
Dean *vs.* Pyncheon, 3 Chandler (Wis.), 9.

Two possible minor objections might be urged against the foreclosure of this property under the claim to a mechanic's lien: first, that the decree gave a lien on too much land; and, second, that the admission of proofs in the court below was irregular.

It might be said that the general lien law in existence in Alabama at the time of the making and enforcement of this contract required the selection of one acre before filing the claim. The answers to this objection are several.

If the decree is valid and binding as an enforcement of an equitable mortgage under the written contract of 2d June, 1886, as it clearly is, then, as has been shown, the mechanic's lien law does not necessarily enter into this cause. If it does so enter, then under the pleadings and proofs a court of equity will not require such selection of one acre in this cause, for the reason that it is shown that the furnace site comprises twenty acres of ground upon which the furnace and appurtenant buildings were erected, and that such site was necessary for the commodious use and operation of the furnace itself. (Statement in bill, record, page 2, fol. 4.)

Phillips on Liens, sections 200–1–2;
Pennock *vs.* Hoover, 5 Rawle (Penn.), 291;
Edwards *vs.* Derickson, 4 Dutcher (N. J.), 39;
Gerald *vs.* Burch, 28 N. J. Eq., 317, 468.

The complete and final answer to any objection of the above nature at this time is that it is well settled that an allegation

that a decree was given by a lower court as to too much land cannot be made on appeal.

Phillips on Liens, sections 391, 388;
Derickson *vs.* Edwards, 5 Dutch. (N. J.), 468.

The other possible objection as to admission of proofs in the court below, if made, is equally without merit.

Under rule 13 of this court no objection can here be urged to these proofs, because their introduction was authorized by Code of Alabama of 1886, section 2770.

Pollak *vs.* Brush Electric Assn., 128 U. S., 447;
Revised Statutes of U. S., section 828;
Conn. Life Ins. Co. *vs.* Union Trust Co., 112 U. S., 250, 255, 256.

But these proofs were really submitted to and considered by the court below, accompanied with an affidavit of one of the counsel for Witherow, which is left out of the record, but a copy of which has been filed with the clerk of this court, and which is printed in the statement of the case on page 4 of this brief, and the original or a certified copy of which is filed with the clerk of this court.

These proofs, with the affidavit accompanying them, establish beyond the possibility of a doubt the meritorious character of the claim. And the record being flawless so far as its assailability here is concerned, the appellant's case is clearly without merit.

It is to be observed that the appellant's position is wholly technical, and it is therefore entitled to no special consideration. It is submitted that upon all the facts of the case the plaintiff was entitled to the lien of an equitable mortgage or to a contractor's statutory lien, and also to a personal judgment, and that the proceedings in enforcement of either of these rights which were halted by the appellant's appeal in this case after his day in court had expired, must be sustained if substantial justice is to be done the appellee. The

appellant has never claimed or pretended that the debt represented by the decree was not due and payable, and no court of error should be astute to assist a delayed technical defense such as this, when the debtor has declined making it at the proper time.

A. H. WINTERSTEEN,
HENRY B. TOMPKINS,
WAYNE MacVEAGH,
For Appellee.

APPENDIX.

Sections of Lien Law of Alabama.

I. Code of Alabama of 1886.

Section 3018 (3440–3441). *Lien declared.*—Every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for, any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this chapter shall have a lien therefor on such building and improvement, and on the land on which the same is situated, to the extent, in ownership of all the right, title, and interest owned therein by such owner or proprietor, and, in area, of the entire lot or parcel of land if in a city, town, or village, or, if not in a city, town, or village, of one acre; but the lien of employés of the contractor and persons furnishing materials to him shall extend only to the amount of any unpaid balance due the contractor by the owner or proprietor; and such employés and materialmen shall also have a lien on such unpaid balance.

3022. *Verified statement to be filed with judge of probate; filing and contents of statement.*—It shall be the duty of every original contractor, within six months, and of every journeyman and day laborer, within thirty days, and of every other person entitled to such lien, within four months after the indebtedness has accrued, to file in the office of the judge of probate of the county in which the property upon which the lien is sought to be established is situated, a statement in writing, ve.ified by the oath of the claimant, or some other person having knowledge of the facts, containing a just and true account of the demand secured by the lien, after all just credits have been given, a discription of the property on which the lien is claimed, and the name of the owner or proprietor thereof, if known, but no error in amount or name of the owner or proprietor shall affect the lien; and unless such statement is so filed, the lien shall be lost.

3025. *Selection of land, when tract exceeds one acre.*—When the land on which the building or improvement is situated is not in a city, town, or village, and exceeds in area one acre, the original contractor, or if he dies, is absent from the State, or, for any cause, refuses or fails, on demand to do so, any other party entitled to the lien, may, at any time prior to filing his statement in the office of the judge of probate, select the one acre which shall be subject to the lien; such selection to include the site of such building or improvement, and the land contiguous thereto, and to constitute but one lot or parcel.

3034. *Issues, verdict and judgment.*—Any defendant, by appropriate plea, may put in issue the fact of indebtedness, or the existence of the lien, or both, and may interpose any other defense applicable to the suit; and if the court by its finding, or the jury by their verdict, as the case may be, ascertain that the plaintiff has a lien as claimed, judgment shall be rendered for the amount secured thereby, interest and costs against the party liable for the same, and establishing the lien, and condeming the property to sale for the satisfaction thereof; but if the finding or verdict is for the plaintiff only on the issue of indebtedness, a judgment shall be rendered in his favor for the amount thereof as in other cases.

3035. *Judgment by default.*—Judgment by default may be rendered against any defendant, except infants and persons *non compos mentis*, who, after service has been perfected on him, fails to appear within the time required by law as in other cases.

3036. *Enforcement of judgments.*—Judgments establishing the lien, and ordering the property sold for the satisfaction thereof, may be enforced by writs of *fieri facias* or *venditioni exponas*; but if by *fieri facias*, the clerk shall indorse thereon the fact, that the lien has been established, and a description of the property.

3048. *When lien may be enforced in equity.*—Any lien provided for under the provisions of this chapter, when the amount claimed is not less than $100, may also be enforced by bill in equity without alleging or proving any special ground of equitable jurisdiction.

II. Code of Alabama, 1876, Sections 3440, 3441, 3442, and 3444.

"Section 3440. *Lien declared.*—(*a.*) Every mechanic, or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler, or machinery for any building, erection, or improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or sub-contractor, upon complying with the provisions of this chapter, shall have for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished, a lien to the extent and in the manner by this chapter provided, upon such building, erections, or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection, or improvement be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection, or improvement, and the lot or land upon which the same are situated, and upon any balance due by the owner or proprietor to the contractor, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler, or machinery furnished as aforesaid, as is herein provided. (1.)"

"Sec. 3441. *Extent of lien.*—(*b.*) The entire land to the extent aforesaid, upon which any such building, erection, or other improvement is situated, including as well that part of the land which is not covered with such building, erection, or other improvement, as that part thereof which is covered with the same, shall be subject to all liens created by this chapter, in favor of the contractor, to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of such building, erection, or other improvement, for whose immediate use or benefit the labor was done or things were furnished; and also in favor of all the employés of such contractor and persons furnishing materials to the amount of any unpaid balance due the contractor by the owner or proprietor."

"SEC. 3442. *Lien has preference.*—(*c.*) The lien for the work or things aforesaid shall attach and be preferred to all other incumbrances which may be attached to, or upon such buildings, erections, or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements; and such lien shall attach to the buildings, erections, or improvements only for which they were furnished or the work was done, in preference to any prior lien, incumbrance, or mortgage upon the land upon which such buildings, erections, improvements, or machinery has been erected or put; and any person enforcing such lien, where there is a prior mortgage or lien upon the land, may have such building, erection, or improvement sold under execution as provided in this chapter, and the purchaser may remove the same within a reasonable time thereafter."

(SEC. 3443 relates to leaseholds.)

"SEC. 3444. *The verified statement to be filed, and time of filing with judge of probate; lien of employé only for balance due contractor.*—(*e.*) It is the duty of every original contractor, within six months, and every journeyman and day laborer, within thirty days, and of every other person seeking to obtain the benefit of the provisions of this chapter, within four months after the indebtedness has accrued, to file with the judge of probate of the county in which the property is situated, upon which a lien is sought to be established, a just and true account of the demand due him, after all just credits have been given, which is to be a lien upon such building or other improvements, or upon the unpaid balance in the owner's or proprietor's hands, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply, or on which the work was done or materials furnished, with the name of the owner or contractor, or both, if known to the person filing the lien, which statement shall, in all cases, be verified by the oath of the claimant, or some other person having knowledge of the facts; which statement or account and description, when so filed, shall be a lien upon the building or other improvements, with all the rights and privileges under this chapter, from and after such filing; but

if the claim so filed belongs to a laborer, sub-contractor, or material man, then the lien shall be only to the extent of the unpaid balance in the hands of the owner or proprietor at and after the notice of the same is given as hereinafter provided."

III. ACT OF THE LEGISLATURE OF ALABAMA, APPROVED FEBRUARY 28TH, 1887, IN ACTS OF ALABAMA OF 1886–1887, PAGE 47.

AN ACT

To adopt a code of laws for the State of Alabama.

SECTION 1. Be it enacted by the General Assembly of Alabama, that the work prepared by Robert E. Brickell, Peter Hamilton, and John P. Tillman, under "An Act to provide for the revision and codification of the public statutes of this State, both civil and criminal," approved February 17th, 1885, is, as the same has been corrected, amended, and reported by the joint committee of the two houses of the General Assembly, adopted and enacted as the Code of Alabama, and shall regulate completely, so far as a statute may, the subject to which it relates, and shall go into force and be operative on the thirtieth day after the date of the Governor's proclamation announcing its publication.

SEC. 2. No Act passed at the present session of the General Assembly shall be repealed or affected in any manner by the adoption of this Code, but all Acts amending sections of the Code of 1876, which sections have been incorporated in this Code, shall be printed in the place of and as such sections.

Approved February 28th, 1887.

B.

Analysis of judgment in Langfeld case.

[Langfeld et al. vs. Hartranft, collector. (U. S. C. C.) No. 3. April session, 1884.]

Entry No.	Vessel.	Date of entry.	Marks and numbers.	Entry description of goods.	Invoice description of goods.	Description of goods in appraiser's return.	Value of goods entered and returned.		Rate of duty on entry.	Rate of duty assessed.	Amount of duty collected.		Amount of duty claimed by importer to be illegally exacted, as per bill of particulars.		Description of goods in protest.	Date of protest.	Amount of principal and description of goods upon which judgment was given for the plaintiffs.	Amount of interest.	Total judgment.	Amount involved without interest upon which importer abandons claim.	Amount and description of goods upon which judgment was given for Government.
9519	Br. Crown	Sept. 11, 1883	LVCO P.	1 case cotton velvets	Colored velvet, black velvets, etc.	Silk and cotton velvet, silk chief value, 50 %.	$641		(Par. 325.) 40%	(Par. 383.) 50%	$320.50		$192.30		Hat trimmings 20 %, under sec. 21, art. 448, act Congress Mar. 3, 1883.	Oct. 16, 1883	Silk and cotton velvets and plushes: $192.30				
"	"	"	L. I. & C. 3284 3285	2 cases silk and cotton plush, velvets, and ribbons.	Silk and cotton plush	Silk and cotton plush, silk chief value, 50 %.	403	$1,775.00	50%	50%	201.50	$887.50	120.90	$532.50	"	"	120.90 $430.50	$66.80	$497.30		
"	"	"	L. I. & C. "	"	Silk and cotton velvet	Silk and cotton velvet, silk chief value, 50 %.	391		50%	50%	195.50		117.30		"	"	117.30				Silk and cotton velvet ribbon: $102.00
"	"	"	" "	"	Silk velvet ribbons	Silk and cotton velvet ribbon, silk chief value, 50 %.	340		50%	50%	170.00		102.00								
9744½	Indiana	Sept. 18, 1883	L. L. & Co., Phila. ½	Two cases cotton velvets	Velvet	Silk and cotton velvet, silk chief value, 50 %.		1,038.00	40%	50%		519.00		311.40	Velvet ribbons 20 %, under act Mar. 3, 1883.	Nov. 20, 1883	Silk and cotton velvets $311.40	47.86	359.26		
11286	Neckar	Oct. 24, 1883	L. L. & Co., 5263	One case cotton velvets	Colored woolen velvets	Cotton velvet ribbons, 40 %		615.00	40%	40%		246.00		123.00	"	"				Velvet ribbon: $123.00	
														966.90			741.90	114.66	856.56	123.00	102.00
																	Interest 102.00				
																	Amount of judgment 843.90				

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS.

James H. Walker ad
Jas H. Walker & Co
vs.
Anthony J. Seibeyer COLLECTOR, ETC.

BILL OF PARTICULARS.

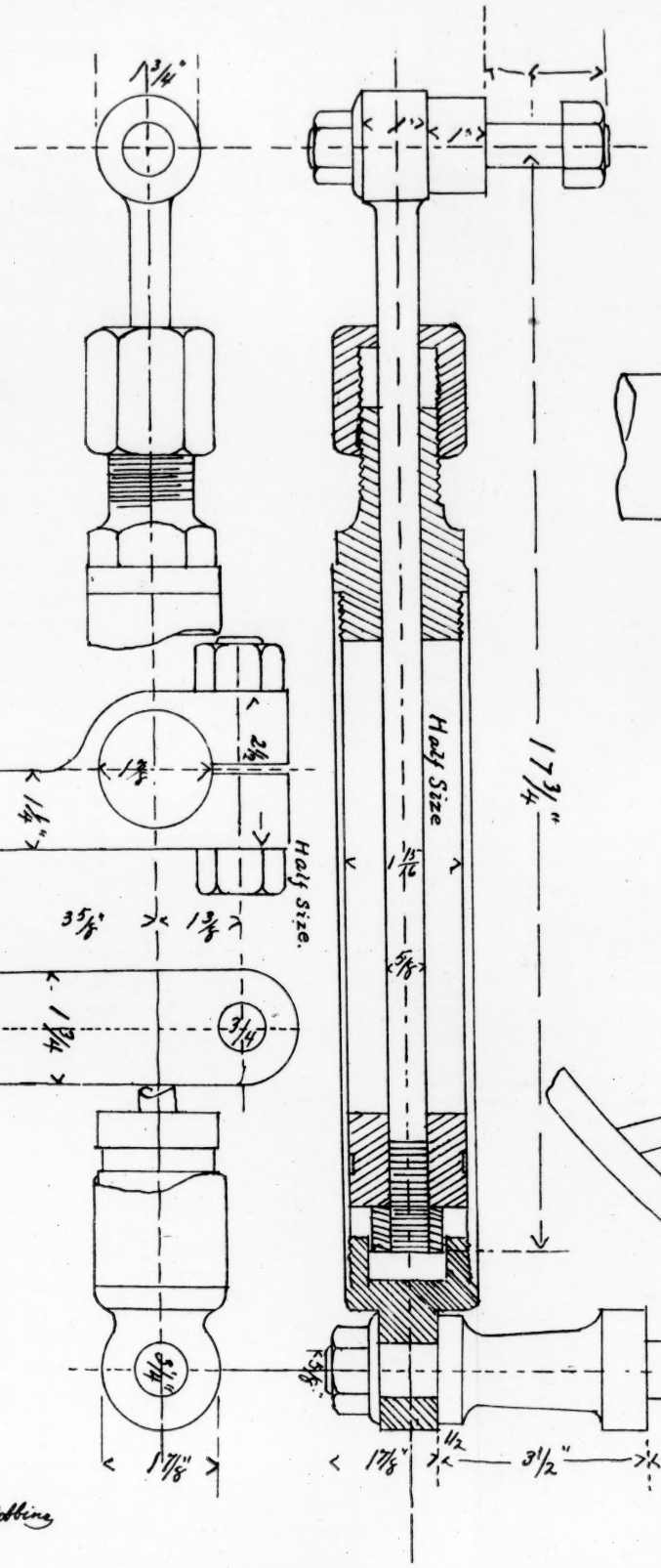
James H. Walker & Co IMPORTERS.

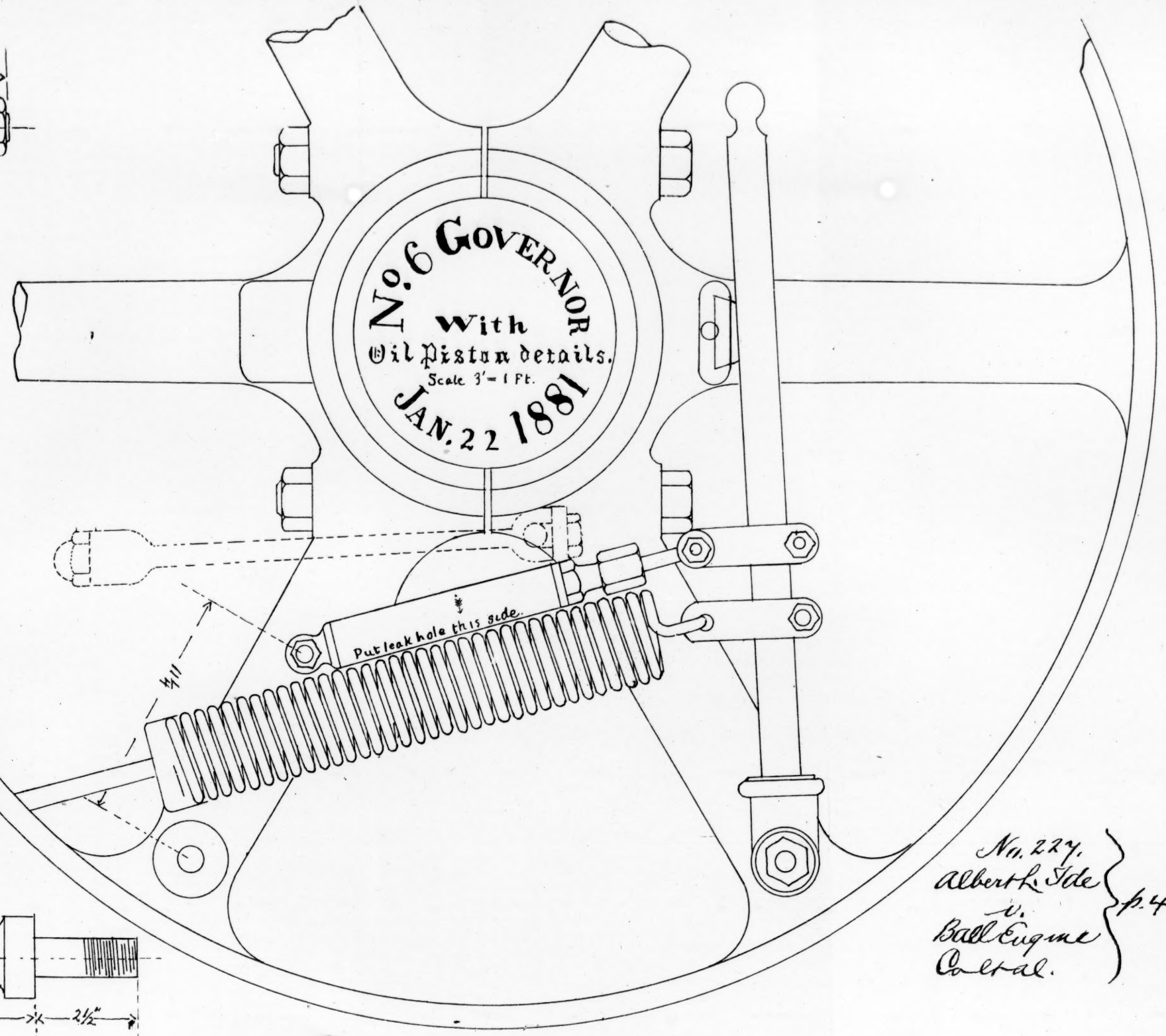
UNITED STATES CIRCUIT COURT
NORTHERN DISTRICT OF ILLINOIS.
May TERM, A. D. 1888
Ge No. 20913
Suit begun, April 10/88
Excess claimed, $ 234 70

Claim No.	Entry No.	Description.	Whence Imported.	Vessel.	Date of Invoice.	Date of Entry.	Excess Claimed.	Date of Payment.	Protest Filed.	Date of Appeal.	Date of Decision.
2848	6761	Hat Trimmings	Paris	Adriatic	Sept 8/87	Oct 3/87	30 15 131 30	Oct 3/87	Oct 31/87	Oct 31/87	Feb 25/88
2820	1414 157	Jet Beads to fill Lunch Axle Kamm	Berlin	Russia	July 27/87	Aug 29/87	51 60	Sept 5. 7. 10. 19 Oct 3	" 8/87	Oct 8/87	Jany 12/88
2857	1189	Silk Embroidery Chenille	Vienna	Wieland	Oct 8/87	Nov. 9/87	51 80	Nov 9/87	Nov 17/87	Nov 17/87	Mch 7/88
							234 70 31 75				

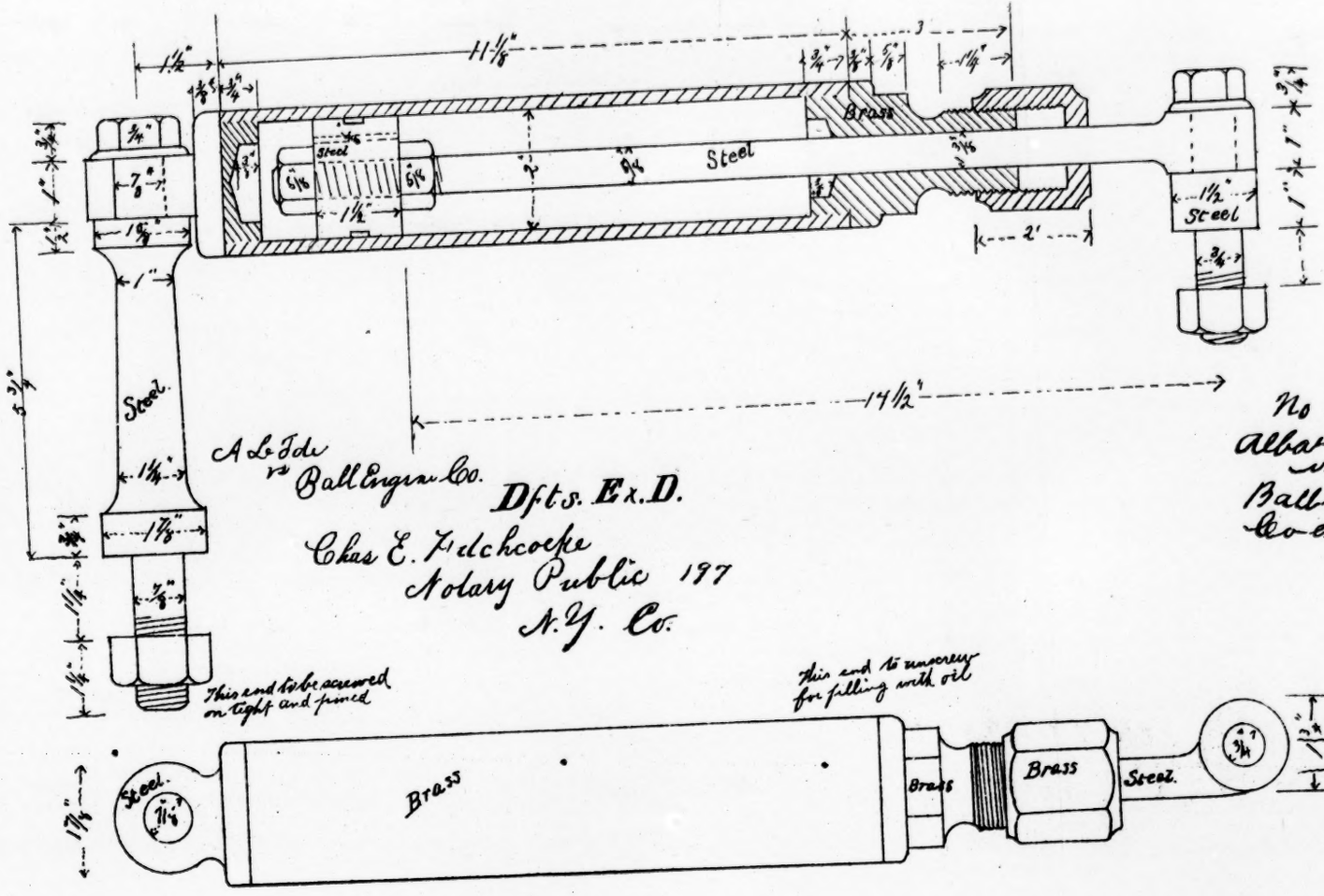
(Endorsed)
Filed May 6. 1888. 217 # Wm H. Bradley, Clerk.

Received copy of the above bill of particulars
on the 25th day of April, 1888.
Wm. G. Ewing
U. S. Atty. for
Defendant.





No. 227.
Albert L. Ide
v.
Ball Engine
Co. et al.
} p. 409



A. Le Tode
vs
Ball Engine Co.
Dft's. Ex. D.
Chas E. Fitchcocke
Notary Public 197
N.Y. Co.

No 222
Albert Tode
v.
Ball Engine
Co et al
} p. 419

Oil Cylinders for governors of Pacific Elevator Engines Nov 17th 1880.
E H. Schneider.

Keep this sketch Clean and return it when through with it.

A.D. 1872. Aug. 15. N° 2427.
THORPE'S Specification.

FIG. 2.

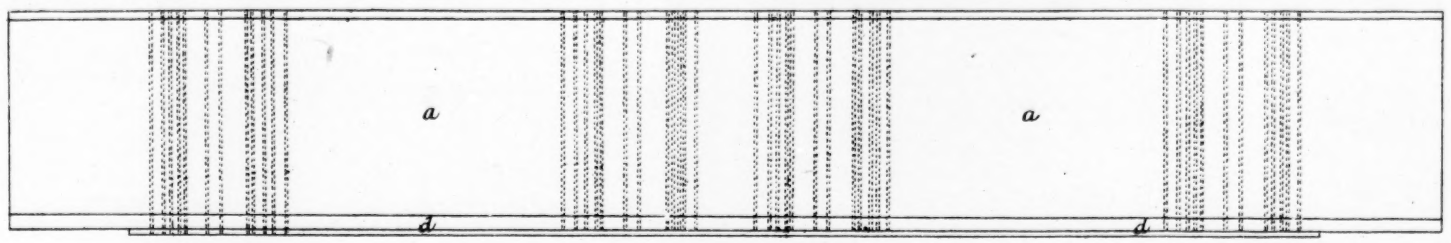


FIG. 1.

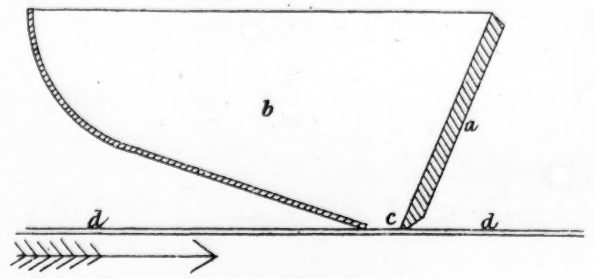
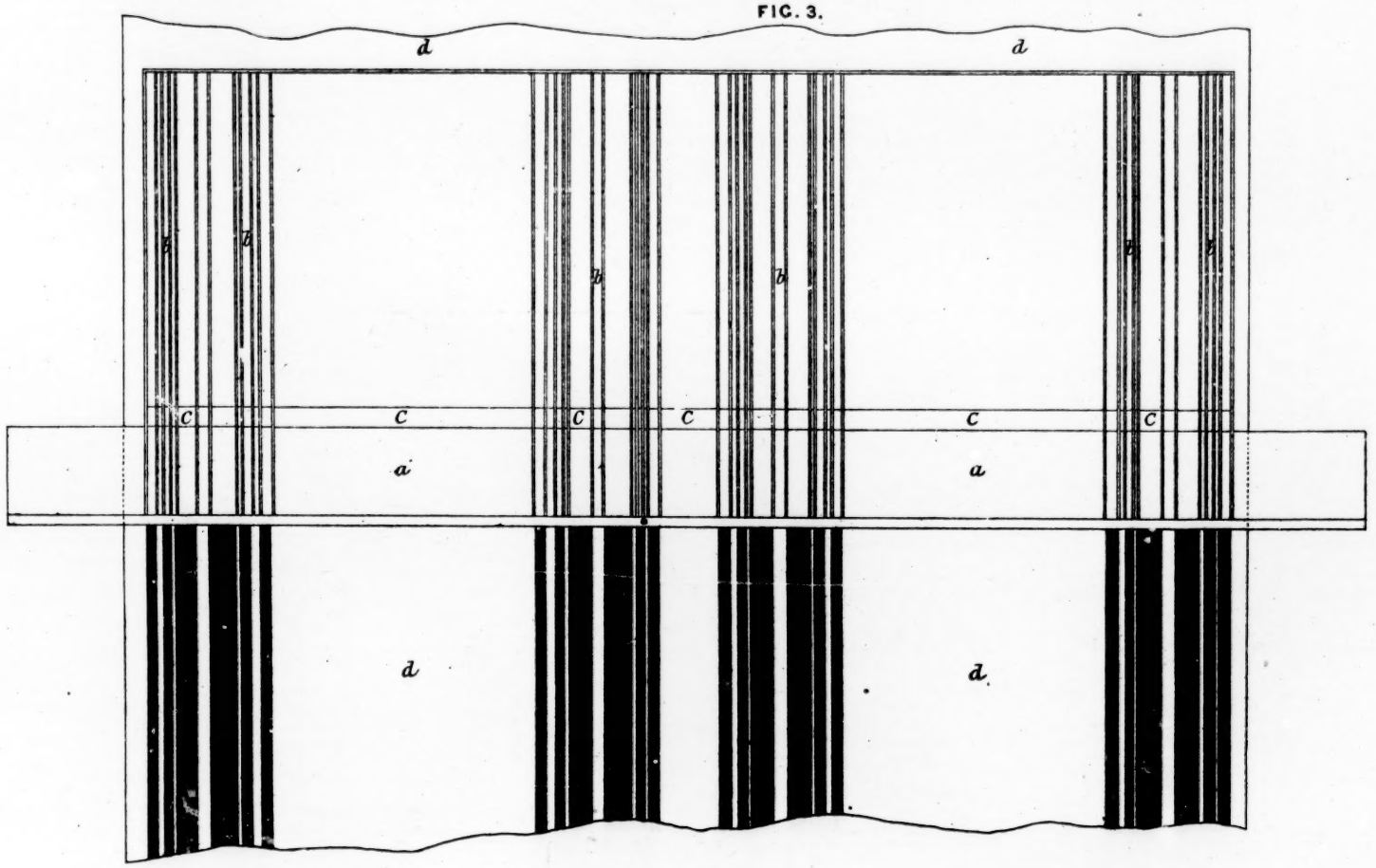


FIG. 3.



No 251,
Brigham, Trustee,
Caffin et al. } p. 57